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Abstract

The Note argues that the passive personality principle could be used by all countries in a uniform manner in order to combat modern intl terrorism. It traces the intl community's gradual acceptance of the principle, analyzes the different ways different countries employ it, argues that instead it should be used in a uniform manner, and concludes that this is the necessary response to the type of intl terrorism that is a threat today.

NOTES

THE PASSIVE PERSONALITY PRINCIPLE AND ITS USE IN COMBATting INTERNATIONAL TERRORISM

INTRODUCTION

During the last few decades, the number of terrorist acts around the world has increased dramatically.¹ During this time, terrorists often have targeted victims due to their nationality.² Recent events throughout the world evidence the vul-

1. Mastrangelo, *International Terrorism: A Regional and Global Overview, 1970-1986*, in *THE ANNUAL ON TERRORISM* — 1986, at 7 (Y. Alexander ed. 1987). This article noted that

[i]n 1970 a total of 293 terrorist attacks were recorded worldwide. By 1979 the figure had increased to 2,585 and during 1985 the count had reached 3,010. In that seventeen-year span a grand total of 28,268 incidents were recorded and over 52 per cent of that total has occurred in the past five years.

Id.; see N. LIVINGSTONE & T. ARNOLD, *FIGHTING BACK* 12 (1986); see also U.S. DEP'T OF STATE, *PATTERNS OF GLOBAL TERRORISM*: 1988, at 1 (1989) (reporting 856 incidents of terrorism in 1988, up from 832 in 1987); U.S. DEP'T OF STATE, *PATTERNS OF GLOBAL TERRORISM*: 1986, at 1 (1988) (reporting 744 incidents of terrorism in 1986); Kane, *Prosecuting International Terrorists in the United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT'L L. 294, 295 (1987) (noting that U.S. Department of State reported 782 incidents of terrorism in 1985); Hannay, *International Terrorism: The Need for a Fresh Perspective*, 8 INT'L LAW. 268, 268-70 (1974); Evans, *A Proposed Method of Control*, 37 J. AIR L. & COM. 171, 172 n.5 (1971). One reason for the discrepancy in the above numbers is the inability of the international community to agree on a uniform definition of terrorism. See *infra* note 163 (discussing the disagreement over the appropriate definition of international terrorism).

2. See Bell, *Comment: The Origins of Modern Terrorism*, 9 TERRORISM 307, 307-09 (1987); *infra* notes 140-41 and accompanying text.

There is no uniform definition of nationality in international law. See *Research in International Law, Harvard Law School, The Law of Nationality*, 23 AM. J. INT'L L. 11, 21 (Spec. Supp. 1929) [hereinafter *The Law of Nationality*]; see also R. FLOURNOY & M. HUDSON, *A COLLECTION OF NATIONALITY LAWS* (1929) (containing examples of nationality laws of several countries). Instead, the duty of defining nationality is generally left to individual states. See CONVENTION OF CERTAIN QUESTION RELATING TO THE CONFLICT OF NATIONALITY LAWS, Apr. 12, 1930, art. 1, 179 L.N.T.S. 89, 99; *The Law of Nationality, supra*, at 80-82. But see *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (absence of genuine link in nationality by naturalization). Most states confer nationality upon persons who are (1) born within the state, (2) born to a national of the state, or (3) naturalized by the state. See *The Law of Nationality, supra*, at 21, 27-29; see also *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (involving nationality by naturalization); *Alexander Tellech Case* (U.S. v. Aus. & Hung.), 6 R. INT'L ARB. AWARDS 248 (1928) (involving dual nationality based on both place of birth (*ius soli*) and national-

nerability of persons travelling or living outside their country.³ These events show that each country must find methods of insuring the safety of its nationals abroad.

Several countries have statutes that grant subject matter jurisdiction over alleged crimes committed in foreign territories.⁴ The passive personality principle of jurisdiction is one

ity of parents (*ius sanguinis*)). See generally R. FLOURNOY & M. HUDSON, *supra* (containing examples of the nationality laws of several countries with these types of nationality requirements).

Under U.S. law, a U.S. national is "a citizen of the United States, or . . . a person who, though not a citizen of the United States, owes a permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22) (1988).

For the purposes of this Note, nationality shall mean "that quality or character which arises from the fact of a person's [relation] to a nation or state. Nationality determines the political *status* of the individual, especially with reference to allegiance" BLACK'S LAW DICTIONARY 923-24 (5th ed. 1979) (emphasis in original).

3. For example, on February 4, 1990, a group of terrorists raided a bus transporting Israeli tourists in Egypt, killing eight and wounding seventeen. Cowell, *8 Killed and 17 Wounded in Raid On Bus of Israeli Tourists in Egypt*, N.Y. Times, Feb. 5, 1990, at A1, col. 5. Also, terrorists murdered a U.S. serviceman during the hijacking of Trans World Airlines flight 847 in June 1985 while the plane sat on a runway at Beirut Airport. Berger, *Gunmen Seize Jet in Mideast Flight; Passenger Killed*, N.Y. Times, June 15, 1985, at A1, col. 6. On October 8, 1985, another group of terrorists murdered a U.S. national on board the *Achille Lauro* during a hijacking of the Italian ship while it was sailing in the Mediterranean. Smith, *The Voyage of the Achille Lauro*, TIME 30, 30-31 (Oct. 21, 1985); Miller, *Hijackers Yield Ship in Egypt; Passenger Slain, 400 Are Safe; U.S. Assails Deal With Captors*, N.Y. Times, Oct. 10, 1985, at A1, col. 6. See generally U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1988, at 8-44 (1989) (noting incidents of terrorism that targeted nationals of various countries).

4. See, e.g., CODE DE PROCÉDURE PÉNALE [C. PR. PEN.] art. 689, ¶ 1 (Daloz 1987-88) (Fra.) (granting jurisdiction over criminal acts committed by a foreigner in foreign territory that injure a French national); CODICE PENALE [C.P.] art. 7 (1930, as amended 1983) (Italy) (granting jurisdiction over certain criminal acts committed abroad by Italian citizens or foreigners); 18 U.S.C. §§ 1203, 2331 (1988) (granting jurisdiction over certain crimes committed abroad by foreigners against U.S. nationals); see also *Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 443, 445 (Supp. 1935) [hereinafter *Harvard Research Project*].

One commentator has identified three types of jurisdiction in international law: executive, judicial, and legislative. Akehurst, *Jurisdiction in International Law*, 46 BRIT. Y.B. INT'L L. 146 (1974). Akehurst defined executive jurisdiction as "the power of one State to perform acts in the territory of another State." *Id.* Judicial jurisdiction is "the power of a State's courts to try cases involving a foreign element." *Id.* Legislative jurisdiction is "the power of a State to apply its laws to cases involving a foreign element." *Id.*

Jurisdiction, as referred to in this Note, includes both judicial and legislative jurisdiction—that is, the power of a state's court both to try cases and to apply the law of its state in cases involving a foreign element. See *id.*

For the purposes of this Note, Professor Levitt's definition of jurisdiction is applicable. Professor Levitt wrote that "[j]urisdiction over criminal offenses means the

basis for the extension of a state's laws over acts committed abroad.⁵ States have used this doctrine to protect their citizens abroad.⁶ Although the principle is an accepted basis of jurisdiction under international law, there is much controversy over the scope of crimes to which it applies.⁷

This Note argues that the passive personality principle could be used by all countries in a uniform manner in order to combat modern international terrorism. Part I analyzes the passive personality principle and its gradual acceptance by the international community. Part II sets forth the approaches used by different countries regarding when the passive personality principle may be used. Part III argues that there is a need to apply the passive personality principle on a uniform basis. Part III further argues that the principle should be limited uniformly to acts of international terrorism that are directed at certain individuals because of their nationality. This Note concludes that in response to the type of international terrorist acts in today's society, there is a need for effective and uniform application of the passive personality principle.

I. THE PASSIVE PERSONALITY PRINCIPLE OF JURISDICTION

A. *The Early History of the Passive Personality Principle*

The passive personality principle⁸ allows a country to ex-

power of a given court to inquire into and determine whether or not an alleged offense has been committed by a designated accused person, and to apply the penalty for an offense so determined." Levitt, *Jurisdiction Over Crimes*, 16 J. CRIM. L. & CRIMINOLOGY 316, 319 (1925) (emphasis and footnote omitted).

5. See *Harvard Research Project*, *supra* note 4, at 445; *infra* notes 8-11, 42-45 and accompanying text (discussing passive personality principle and other bases of jurisdiction under international law).

6. See, e.g., *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985) (affirming conviction of a Colombian for robbery, conspiracy to murder, and assault with a deadly weapon on U.S. agents in Colombia); *United States v. Yunis*, 681 F. Supp. 896 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989) (applying U.S. laws to hijacking in Mediterranean because U.S. nationals were on board plane).

7. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402 comment g [hereinafter RESTATEMENT (THIRD)]; *infra* notes 92-140 and accompanying text (discussing controversy over scope of principle's application).

8. The passive personality principle is also known as the passive nationality principle. See 1 M. TRAVERS, *LE DROIT PENAL INTERNATIONAL LAW* 73 (1920); Beckett, *The Exercise of Criminal Jurisdiction Over Foreigners*, 6 BRIT. Y.B. INT'L L. 44, 55, 57 (1925).

ercise jurisdiction over an act committed by an individual outside of its territory because the victim is one of that country's nationals.⁹ The passive personality principle is based on the duty of a state to protect its nationals abroad.¹⁰ Under this principle, the sovereign asserting jurisdiction is concerned with the crime's effect, rather than where it occurs.¹¹ The passive personality principle is the most controversial of the five accepted bases of jurisdiction in international law.¹² Histori-

9. *Harvard Research Project*, *supra* note 4, at 445. The principle is usually used only to gain jurisdiction over the acts of a foreigner abroad; however, theoretically it can be used to gain jurisdiction over the acts of a national abroad. Thus, there may be an overlap between the passive personality and nationality principles. See *infra* note 43 (discussing nationality principle).

10. See *The Lotus Case* (Fra. v. Turk.), P.C.I.J. (ser. A) No. 10, at 55 (1923), 2 HUDSON, WORLD COURT REPORTS 20, 60 (1929) (Lord Finlay, dissenting); see also *United States v. Yunis*, 681 F. Supp. 896, 901 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989) ("[The passive personality principle] recognizes that each state has a legitimate interest in protecting the safety of its citizens when they journey outside national boundaries."); Beckett, *supra* note 8, at 57-58; Sarkar, *The Proper Law of Crime in International Law*, in INTERNATIONAL CRIMINAL LAW 50, 66 (G. Mueller & E. Wise eds. 1965).

In *The Lotus Case*, Lord Finlay stated:

The passing of such laws to affect aliens is defended on the ground that they are necessary for the "protection" of the national. Every country has the right and the duty to protect its nationals when out of their own country. If crimes are committed against them when abroad, it may insist on the offender being brought to justice

The Lotus Case, at 55, 2 HUDSON, WORLD COURT REPORTS at 60 (Lord Finlay, dissenting).

11. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.). The Second Circuit held that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." *Id.* This principle is known as the "effects doctrine." See *The Lotus Case*, at 23, 2 HUDSON, WORLD COURT REPORTS at 38; RESTATEMENT (THIRD), *supra* note 7, § 402(1)(c); Blakesley, *Jurisdiction as Legal Protection Against Terrorism*, 19 CONN. L. REV. 895, 926 (1987).

12. See, e.g., *Yunis*, 681 F. Supp. at 901 ("[T]he [passive personality] principle is the most controversial of the five sources of jurisdiction . . ."); see also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 30(2) [hereinafter RESTATEMENT (SECOND)]; M. BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES 382 (1975) [hereinafter M. BASSIOUNI, INTERNATIONAL TERRORISM]; M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 255-56 (1974) [hereinafter M. BASSIOUNI, INTERNATIONAL EXTRADITION]; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 296 (2d ed. 1973); D. GREIG, INTERNATIONAL LAW 307 (1970); Beckett, *supra* note 8, at 58 ("It must be admitted that this claim to jurisdiction has not received international sanction."); Kane, *supra* note 1, at 298-99; McGinley, *The Achille Lauro Affair — Implications for International Law*, 52 TENN. L. REV. 691, 711-13 (1985); *Harvard Research Project*, *supra* note 4, at 578-79.

The principles of jurisdiction occasionally overlap and are frequently used in

cally, the controversy concerning the passive personality principle was whether or not it is a valid basis of jurisdiction under international law.¹³ The basis for this controversy was that the principle subjects an individual to the laws of a country with which the individual's only connection is the victim's nationality.¹⁴

In the late nineteenth century, the use of the passive personality principle was a source of conflict between certain states.¹⁵ The principle appeared in several states' penal codes during the nineteenth century.¹⁶ In 1886, Mexico's assertion of passive personality jurisdiction caused great friction between the United States and Mexico.¹⁷ In *Cutting's Case*,¹⁸ Mr. Cutting, a U.S. citizen, published an article in a Texas newspaper criticizing a Mexican citizen with whom Mr. Cutting had a disagreement.¹⁹ Mexican officials arrested Mr. Cutting when

combination by courts to acquire jurisdiction over an act. See *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984) (holding jurisdiction proper under both protective and passive personality principles), *cert. denied*, 471 U.S. 1137 (1985); *United States v. Yunis*, 681 F. Supp. 896, 900-03 (D.D.C. 1988) (holding that court had jurisdiction under both passive personality and universality principles), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989). See *infra* notes 42-45 for the definitions of the other bases of jurisdiction.

13. See RESTATEMENT (SECOND), *supra* note 12, § 30(2); M. BASSIOUNI, *INTERNATIONAL TERRORISM*, *supra* note 12, at 382; M. BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 12, at 255-56; I. BROWNLIE, *supra* note 12, at 296; D. GREIG, *supra* note 12, at 307; Beckett, *supra* note 8, at 58; Kane, *supra* note 1, at 298-99; McGinley, *supra* note 12, at 711-13; *Harvard Research Project*, *supra* note 4, at 578-79.

14. See D. GREIG, *supra* note 12, at 307 ("It would seem illogical to make jurisdiction depend on the purely fortuitous fact of the victim's nationality."); *infra* notes 23-37 and accompanying text (discussing *The Lotus Case*).

15. See *Cutting's Case*, U.S. DEP'T OF STATE, 1887 FOREIGN RELATIONS 751 (1888), 2 MOORE, *INTERNATIONAL LAW DIGEST* 228 (1906) (conflict between United States and Mexico over Mexico's use of the principle); *infra* notes 17-22 and accompanying text (discussing *Cutting's Case*).

16. See, e.g., CODIGO PENAL PARA EL DISTRITO FEDERAL [C.P.D.F.] art. 186 (1886) (Mex.); CODIGO PENAL, art. 7 (1889) (Uru.). The Mexican statute provided that "[p]enal offenses committed in a foreign country . . . by a foreigner against Mexicans, may be punished in the Republic and according to its laws." *Cutting's Case*, at 760, 2 MOORE, *INTERNATIONAL LAW DIGEST* at 230-31 (translating art. 186 of Mexican Penal Code). The Uruguay penal code stated that its courts have jurisdiction over "offenses committed in foreign territory by an alien, to the injury of a citizen." *Harvard Research Project*, *supra* note 4, at 578 (translating art. 7 of Uruguay Penal Code).

17. See *infra* notes 18-22 and accompanying text (discussing conflict between United States and Mexico).

18. U.S. DEP'T OF STATE, 1887 FOREIGN RELATIONS 751 (1888), 2 MOORE, *INTERNATIONAL LAW DIGEST* 228 (1906).

19. *Id.*, 2 MOORE, *INTERNATIONAL LAW DIGEST* at 229.

he was in Mexico and charged him with criminal libel.²⁰ The United States protested Mexico's assertion of passive personality jurisdiction over the crime.²¹ The conflict concluded, however, without a decision on the validity of the passive personality principle because each country dropped the issue after Mr. Cutting was released for diplomatic reasons.²²

During the early twentieth century, more countries implemented the passive personality principle in their penal codes.²³ Its use, however, once again became a source of conflict in 1926.²⁴ In *The Lotus Case*,²⁵ France objected to Turkey's assertion of passive personality jurisdiction in accordance with the Turkish Criminal Code.²⁶ On the night of August 2, 1926, a collision occurred on the high seas between a French steamer, the S.S. *Lotus*, and a Turkish collier, the *Boz-Kourt*.²⁷ The Turkish ship sank as a result of the damage it sustained.²⁸ Eight of the Turkish seamen on board the *Boz-Kourt* perished.²⁹ The French watch officer in charge of navigation of the S.S. *Lotus* at the time of the collision voluntarily appeared before Turkish authorities investigating the collision.³⁰ Turkish officials arrested the French officer and the Turkish ship's first officer,

20. *Id.*

21. *Id.*

22. D. GREIG, *supra* note 12, at 307.

23. See, e.g., KEIHŌ (PENAL CODE), LAW NO. 45 OF 1907 [KEIHŌ] art. 3 (Japan); CODIGO PENAL art. 5 (1924) (Peru); CEZA HUKUKU art. 6 (1926) (Turk.). The Japanese statute provided that "[its penal] law also applies to foreigners who have committed offenses . . . against Japanese subjects outside the Empire." *Harvard Research Project*, *supra* note 4, at 578 (translating art. 3 of the Japanese penal code). Under Peruvian law "[o]ffences committed outside the territory of the Republic shall be punished [when the] . . . [o]ffences [are] . . . committed by an alien against a national." *Harvard Research Project*, *supra* note 4, at 579 (translating art. 5 of Peruvian penal code). Turkish law stated that "[a]ny foreigner who . . . commits an offence abroad to the prejudice . . . of a Turkish subject . . . shall be punished in accordance with the Turkish Penal Code." *The Lotus Case* (Fra. v. Turk.), P.C.I.J. (ser. A) No. 10, at 15, 2 HUDSON, WORLD COURT REPORTS 20, 31-32 (translating art. 6 of Turkish criminal code).

24. See *infra* notes 25-37 and accompanying text (discussing conflict between France and Turkey over Turkey's assertion of passive personality principle).

25. (Fra. v. Turk.), P.C.I.J. (ser. A) No. 10 (1923), 2 HUDSON, WORLD COURT REPORTS 20 (1929).

26. *Id.*; see CEZA HUKUKU art. 6 (1926) (Turk.). See *supra* note 23 for the relevant portions of this statute.

27. *The Lotus Case*, at 10, 2 HUDSON, WORLD COURT REPORTS at 28.

28. *Id.*

29. *Id.*

30. *Id.*

charging them with manslaughter.³¹ On September 15, 1926, the Turkish Criminal Court convicted and sentenced both officers for manslaughter.³²

France objected to Turkey's assertion of jurisdiction over the act, and the two countries agreed to submit the case to the Permanent Court of International Justice for determination.³³ In its decision, the majority refused to address the validity of the passive personality principle because it determined that Turkey had other valid grounds for jurisdiction.³⁴ Despite the majority's refusal to address the passive personality principle, each of the six dissenting judges addressed the issue.³⁵ All of the dissenting judges rejected the passive personality principle because it did not conform with international law.³⁶ The dissenting judges argued that under international law a country could not extend its laws to cover alleged offenses committed by foreigners outside the territory of that country.³⁷

31. *Id.* at 11, 2 HUDSON, WORLD COURT REPORTS at 28.

32. *Id.*, 2 HUDSON, WORLD COURT REPORTS at 29. The French officer was sentenced to eighty days imprisonment and a fine of twenty-two pounds. *Id.* The first officer of the Turkish ship was given a slightly more severe penalty. *Id.*

33. *Id.* at 12, 2 HUDSON, WORLD COURT REPORTS at 29.

34. *Id.* at 22-23, 2 HUDSON, WORLD COURT REPORTS at 38. The majority determined that Turkey had jurisdiction based on a combination of the objective territorial theory (the effects doctrine) and the floating territory theory, by which a country has territoriality jurisdiction over crimes that occur on its vessels as an extension of its territory. See M. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 12, at 255 n.127.

35. The *Lotus Case*, (Fra. v. Turk.), P.C.I.J. (ser. A) No. 10, at 34-107 (1923), 2 HUDSON, WORLD COURT REPORTS 20, 46-91 (1929) (dissenting opinions). Six judges found in favor of Turkey, and six found in favor of France. Berge, *The Case of the S.S. "Lotus"*, 26 MICH. L. REV. 361, 367 (1928). Pursuant to the rules of the Permanent Court, the President of the Court voted again to break the tie vote in favor of Turkey. *Id.*

36. *The Lotus Case*, at 34, 44-45, 57-58, 64, 91, 94, 102, 2 HUDSON, WORLD COURT REPORTS at 47, 53-54, 61-62, 65, 81, 83, 88 (dissenting opinions).

37. See *id.* at 34, 44-45, 57-58, 64, 91, 94, 102, 2 HUDSON, WORLD COURT REPORTS at 47, 53-54, 61-62, 65, 81, 83, 88 (dissenting opinions).

For example, one of the dissenting judges stated that "[t]he criminal law of a State . . . cannot extend to offences committed by a foreigner in a foreign territory, without infringing the sovereign rights of the foreign State concerned, since in that State the State enacting the law has no jurisdiction." *Id.* at 35, 2 HUDSON, WORLD COURT REPORTS at 47 (Loder, J. dissenting) (emphasis in original). Another judge stated that "[t]he criminal jurisdiction of a State therefore is based on and limited by the territorial area over which it exercises sovereignty. This is the principle, and it is an indisputable principle of international law." *Id.* at 45, 2 HUDSON, WORLD COURT REPORTS at 54 (Weiss, J. dissenting) (emphasis in original). Also, Judge Moore wrote:

In 1935, Harvard Law School published the results of its research concerning international criminal law (the "Harvard Research Project").³⁸ One of the reasons that Harvard Law School commenced an investigation into international penal law was to create a draft international convention on criminal jurisdiction.³⁹ The introductory comment to the section on jurisdiction stated that there was a need for cooperation among the countries of the world in the area of international criminal law.⁴⁰ The need for cooperation and a model international penal code became more pronounced by the "increasing facility of travel, transport and communication" of the 1930s.⁴¹ The Harvard Research Project noted that countries were utilizing five bases of jurisdiction in criminal cases: territoriality,⁴² nationality,⁴³ protective,⁴⁴ universality,⁴⁵ and passive personal-

I am of the opinion that the criminal proceedings in the case now before the Court, so far as they rested on Article 6 of the Turkish Penal Code, were in conflict with the following principles in international law: (1) that the jurisdiction of a State over the national territory is exclusive; (2) that foreigners visiting a country are subject to the local law, and must look to the courts of that country for their judicial protection; (3) that a State cannot rightfully assume to punish foreigners for alleged infractions of laws to which they were not, at the time of the alleged offence, in any wise subject.

Id. at 94, 2 HUDSON, WORLD COURT REPORTS at 83 (Moore, J. dissenting).

One commentator has asserted that Judge Moore's off-handed rejection of the passive personality principle under international law was incorrect. *See Berge, supra* note 35, at 382.

38. *Harvard Research Project, supra* note 4, at 1.

39. *Id.* Harvard Law School also presented reports on extradition and the law of treaties. *Id.*

40. *Id.*

41. *Id.* at 443.

42. *See* RESTATEMENT (THIRD), *supra* note 7, § 402(1)(a); *Harvard Research Project, supra* note 4, at 445; *see also* 1 M. TRAVERS, *supra* note 8, at 73. The territoriality principle is the most widely accepted of the principles. Akehurst, *supra* note 4, at 152; *Harvard Research Project, supra* note 4, at 445. Territoriality jurisdiction is based on the occurrence of the criminal act within the country seeking to exercise jurisdiction over it. L. HENKIN, INTERNATIONAL LAW CASES AND MATERIALS 823 (1987); Sarkar, *supra* note 10, at 52; *Harvard Research Project, supra* note 4, at 445. The sovereign's interest in maintaining order within its territory is the justification for this principle. *Harvard Research Project, supra* note 4, at 483; *see* Akehurst, *supra* note 4, at 152; Beckett, *supra* note 10, at 55-56; McGinley, *supra* note 12, at 707; Sarkar, *supra* note 10, at 52.

43. *See* RESTATEMENT (THIRD), *supra* note 7, § 402(2); *Harvard Research Project, supra* note 4, at 445; *see also* 1 M. TRAVERS, *supra* note 8, at 73. The nationality principle is based on the nationality of the alleged criminal. *Harvard Research Project, supra* note 4, at 519; *see* In Re Di Lisi, 7 I.L.R. 193 (Italy Court of Cassation 1934) (affirming conviction of Italian national for conspiring in the United States to forge travelers checks); X. v. Public Prosecutor, 19 I.L.R. 226 (Neth. Court of Appeal of The Hague 1952) (affirming conviction of a Dutch national for crime committed

ity.⁴⁶

At the time of the Harvard Research Project, some form of passive personality jurisdiction existed in a number of countries' criminal statutes.⁴⁷ The Harvard Research Project, however, did not include passive personality jurisdiction in its Draft Convention on Jurisdiction with Respect to Crime (the "Draft Convention").⁴⁸ The Harvard Research Project stated that the passive personality principle could be justified only if it were circumscribed with certain safeguards in order to limit

outside territory of the Netherlands). The nationality principle is justified by the sovereign's interest in retaining control over the acts of its nationals wherever they may be. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 202-03 (1983); see *Harvard Research Project*, *supra* note 4, at 519; see also Sarkar, *supra* note 10, at 66. Another justification for the nationality principle is "that the protection of nationals abroad gives rise to a reciprocal duty of obedience." *Harvard Research Project*, *supra* note 4, at 520; see Sarkar, *supra* note 10, at 61-62.

44. See RESTATEMENT (THIRD), *supra* note 7, § 403(3); *Harvard Research Project*, *supra* note 4, at 445; see also I M. TRAVERS, *supra* note 8, at 73. The protective principle relies on the concept that a country should be able to protect its interests against criminal acts. *Harvard Research Project*, *supra* note 4, at 543; see Sarkar, *supra* note 10, at 68. The protective principle requires that jurisdiction be used to protect a security interest or the operation of the country's governmental functions. *Nusselein v. Belgian State*, 17 I.L.R. 136 (Belg. Court of Cassation 1950) (holding that Belgian courts had jurisdiction to try case involving a foreign soldier for acts committed against safety of Belgium); *Public Prosecutor v. L.*, 18 I.L.R. 206 (Neth. Supreme Court 1951) (affirming conviction of Belgian national as accessory to counterfeiting currency of the Netherlands when acts occurred in Belgium); L. HENKIN, *supra* note 42, at 823; Kane, *supra* note 1, at 299; Paust, *supra* note 43, at 209.

45. See RESTATEMENT (THIRD), *supra* note 7, § 404; *Harvard Research Project*, *supra* note 4, at 445; see also I M. TRAVERS, *supra* note 8, at 73. The universality principle is based on the theory that certain crimes are so egregious that all nations have an interest in exercising jurisdiction to combat them. L. HENKIN, *supra* note 42, at 823; Randall, *Universal Jurisdiction Under International Law*, 66 TEXAS L. REV. 785, 788 (1988). Piracy, slave trading, attacks on or hijacking of aircraft, genocide, war crimes, and drug trafficking are all considered to be such "universal" crimes. McCredie, *Contemporary Use of Force Against Terrorism: The United States Response to Achille Lauro — Questions of Jurisdiction and its Exercise*, 16 GA. J. INT'L & COM. L. 435, 439 (1986).

46. *Harvard Research Project*, *supra* note 4, at 445; L. HENKIN, *supra* note 42, at 823.

47. *Harvard Research Project*, *supra* note 4, at 578 (noting that the following countries were in 1935 asserting some type of passive personality jurisdiction: Albania, Brazil, China, Cuba, Czechoslovakia, Estonia, Finland, Greece, Guatemala, Italy, Japan, Latvia, Lithuania, Mexico, Monaco, Peru, Poland, Rumania, San Marino, the Soviet Union, Sweden, Switzerland, Turkey, Uruguay, Venezuela, and Yugoslavia).

48. See *Harvard Research Project*, *supra* note 4, at 439-42; see also M. BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 12, at 256; Kane, *supra* note 1, at 298-99 (noting that passive personality jurisdiction was not included in the Draft Convention with Respect to Crime which was published in the *Harvard Research Project*).

the scope of the principle's application.⁴⁹ With the inclusion of the particular safeguards, almost every case covered by the passive personality principle would be covered by the universality principle.⁵⁰ The Harvard Research Project did not include passive personality jurisdiction in its Draft Convention because of the overlap between the passive personality and universality principles.⁵¹ Since the Harvard Research Project was published, however, numerous courts and scholars have accepted the bases of jurisdiction it identified, including the passive personality principle.⁵²

B. Current Application of the Passive Personality Principle

Although the validity of the passive personality principle was the subject of controversy during the early part of this century,⁵³ over the last two decades the international community has increasingly accepted the use of the passive personality principle.⁵⁴ The recent acceptance, however, is limited to the

49. *Harvard Research Project*, *supra* note 4, at 579. Although the *Harvard Research Project* does not state which safeguards should be applied to the passive personality principle, it does state that "the essential safeguards and limitations are precisely those by which the principle of universality is circumscribed in [article 10 of the Draft Convention with Respect to Crime]." *Id.* Article 10 applies the universality principle to crimes committed abroad by an alien when it is an offense where it is committed, if the state with territoriality jurisdiction refuses to prosecute, and prosecution is not time barred. *Id.* at 440-41.

50. *Id.* at 579; see I. BROWNIE, *supra* note 12, at 296 (noting that there is overlap between passive personality and universality principles).

51. *Harvard Research Project*, *supra* note 4, at 579; see I. BROWNIE, *supra* note 12, at 296 ("[M]any of [the passive personality principle's] applications fall under the principles of protection and universality.").

52. *United States v. Yunis*, 681 F. Supp. 896, 900 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989); see *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967); W. BISHOP, *INTERNATIONAL LAW CASES AND MATERIALS* 440 (1962); A. D'AMATO, *INTERNATIONAL LAW AND WORLD PUBLIC ORDER* 564 (1980).

53. See *The Lotus Case* (Fra. v. Turk.), P.C.I.J. (ser. A) No. 10 (1923), 2 HUDSON, *WORLD COURT REPORTS* 20 (1929) (rejection by France of passive personality principle); *Cutting's Case*, U.S. DEP'T OF STATE, 1887 FOREIGN RELATIONS 751 (1888), 2 MOORE, *INTERNATIONAL LAW DIGEST* 228 (1906) (noting U.S. rejection of principle).

54. RESTATEMENT (THIRD), *supra* note 7, § 402 comment g; see *United States v. Yunis*, 681 F. Supp. 896, 901 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989) ("Although many legal scholars agree that the principle is the most controversial of the five sources of jurisdiction, they also agree that the international

principle's application against international terrorism, and not to ordinary torts and crimes, which are considered within the strict domain of the sovereign where these acts occur.⁵⁵ This limitation is due to the international community's desire to balance the interests of the country whose national has been victimized against that of the country with territoriality jurisdiction.⁵⁶ In this manner the sovereignty interests of the country with territoriality jurisdiction can be protected.⁵⁷

The recent acceptance of the passive personality principle was evidenced in the 1970s by the codification of the principle by certain countries.⁵⁸ In 1972, Israel amended its criminal laws by codifying the passive personality principle.⁵⁹ Three years later, the French legislature also amended its penal code to include passive personality jurisdiction.⁶⁰ This amendment

community recognizes its legitimacy."); Paust, *supra* note 43, at 203 ("[T]he extraterritorial reach of such a law premised upon . . . the [passive personality principle] would not be in doubt as a matter of international law."); U.S. DEP'T OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER CRIMINAL STATUTES ENACTED BY THE 98TH CONGRESS 200 (1984) ("Congress chose to provide such protection for Americans by utilizing . . . the 'passive personality' (*i.e.*, nationality of the victim) basis for extraterritorial jurisdiction under international law.").

55. RESTATEMENT (THIRD), *supra* note 7, § 402 comment g. Comment g states that "[t]he principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials." *Id.*

56. *The Lotus Case*, at 35 (1923), 2 HUDSON, WORLD COURT REPORTS at 47 (Loder, J. dissenting); see *infra* note 165 (discussing infringement of sovereignty caused by use of passive personality principle).

57. *The Lotus Case*, at 35, 2 HUDSON, WORLD COURT REPORTS at 47 (Loder, J. dissenting); see *infra* note 165 (discussing infringement of sovereignty where passive personality principle used).

58. See *infra* notes 59-63.

59. Penal Law Amendment (Offenses Committed Abroad) (Amendment No. 4) Law 5732, 26 LAWS OF THE STATE OF ISRAEL (official translation prepared at the Ministry of Justice, 1971-72). The amendment provides that

[t]he courts in Israel shall be competent to try in Israel under Israeli law a person who has committed abroad an act which would be an offence if it had been committed in Israel and which harmed or was intended to harm the life, person, health, freedom or property of a national or resident of Israel.

Id.; see Bassiouni, *Theories of Jurisdiction and Their Application in Extradition Law and Practice*, 5 CAL. W. INT'L L.J. 1, 46 (1974).

60. C. PR. PEN. art. 689, ¶ 1 (Daloz 1987-88) (Fra.). This amendment provided that "[a]ny foreigner who, beyond the territory of the Republic, is guilty of a crime, either as author or accomplice, may be prosecuted and convicted in accordance with the disposition of French law, when the victim of the crime is a French national."

is particularly noteworthy in light of the objections raised by the French government to the assertion of passive personality jurisdiction by Turkey in *The Lotus Case* in 1926.⁶¹ The Turkish statute at issue in *The Lotus Case* granted passive personality jurisdiction over a limited number of crimes.⁶² The new French statute, however, allows passive personality jurisdiction over all crimes committed abroad by foreigners to the prejudice of French nationals.⁶³

U.S. courts have also begun to apply the passive personality principle.⁶⁴ In *United States v. Benitez*,⁶⁵ the defendant, a Colombian national, was convicted of conspiring to murder U.S. Drug Enforcement Administration agents in Colombia.⁶⁶ In *Benitez*, the Court of Appeals for the Eleventh Circuit held that the United States gained jurisdiction on both the passive personality and protective principles.⁶⁷

Moreover, in *United States v. Yunis*,⁶⁸ the United States prosecuted a Lebanese citizen for hijacking a Jordanian airplane in the Mediterranean in June 1985.⁶⁹ The only nexus between the hijacking and the United States was the presence

Blakesley, *supra* note 11, at 938 n.140 (translating art. 689, ¶ 1 of the French Code of Criminal Procedure).

61. *The Lotus Case* (Fra. v. Turk.), P.C.I.J. (ser. A) No. 10, at 6, 2 HUDSON, WORLD COURT REPORTS 20, 24 (1929). For a discussion of *The Lotus Case*, see *supra* notes 24-37 and accompanying text.

62. See CEZA HUKUKU art. 6 (1926) (Turk.). The Turkish criminal code limited passive personality jurisdiction to offenses not included in article 4 of the Turkish criminal code (various forms of counterfeiting) and which carried a sentence of more than one year of loss of freedom. *Id.*

63. C. PR. PEN. art. 689, ¶ 1 (Dalloz 1987-88) (Fra.); see Blakesley, *supra* note 11, at 938-40.

64. See *infra* notes 65-73 and accompanying text (discussing acceptance of passive personality principle by U.S. courts).

65. 741 F.2d 1312 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985).

66. *Benitez*, 741 F.2d at 1313-15.

67. *Id.* at 1316. The court held that

jurisdiction exists in this case under [the protective and passive personality principles]. Under the protective principle, the crime certainly had a potentially adverse effect upon the security or governmental function of the [United States]. Furthermore, the nationality of the victims, who are also United States government agents, clearly supports jurisdiction.

Id. (citations omitted). For a discussion of the protective principle, see *supra* note 44.

68. 681 F. Supp. 896 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989).

69. *Yunis*, 681 F. Supp. at 899.

of U.S. nationals on board the hijacked plane.⁷⁰ In March 1989, a jury in the District Court for the District of Columbia convicted the defendant of hijacking and other crimes.⁷¹ One of the bases for the jurisdiction of the U.S. court over the hijacking was the passive personality principle.⁷² The court held that the U.S. assertion of passive personality jurisdiction was proper under both international law and U.S. law.⁷³

Furthermore, an analysis of U.S. actions in the *Achille Lauro* affair also demonstrates U.S. acceptance of the passive personality principle.⁷⁴ On October 7, 1985, members of the Palestine Liberation Front seized the *Achille Lauro*, an Italian cruise ship, and murdered one passenger.⁷⁵ The passenger killed was one of twenty-eight U.S. nationals on board the ship.⁷⁶ In order to terminate the hijacking, Egypt provided an aircraft to the hijackers.⁷⁷ U.S. fighter planes forced the air-

70. *Id.*

71. Engelberg, *U.S. Convicts Arab in Jet's Hijacking*, N.Y. Times, Mar. 15, 1989, at A3, col. 4. On October 4, 1989, Mr. Yunis was sentenced by the district court to five years of incarceration for conspiracy, twenty years for air piracy, and thirty years for hostage taking. Reuters, *Lebanese Hijacker Given a 30-Year Sentence*, N.Y. Times, Oct. 5, 1989, at A7, col. 1. The sentences are to run concurrently. *Id.*

72. *Yunis*, 681 F. Supp. at 900-03 (court also relied on universality principle); see *supra* note 45 (discussing universality principle).

73. *United States v. Yunis*, 681 F. Supp. 896, 900-03 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989).

74. See *Yunis*, 681 F. Supp. at 900-03 (discussing U.S. assertion of passive personality jurisdiction in *Achille Lauro* affair); McGinley, *supra* note 12, at 710-13 (discussing U.S. acceptance of passive personality jurisdiction in *Achille Lauro* affair).

75. *Yunis*, 681 F. Supp. at 902-03; Miller, *Hijackers Yield Ship in Egypt; Passenger Slain, 400 Are Safe; U.S. Assails Deal With Captors*, N.Y. Times, Oct. 10, 1985, at A1, col. 6.

76. See McCredie, *supra* note 46, at 436.

77. Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Divert It To NATO Base In Italy; Gunmen Face Trial In Slaying of Hostage*, N.Y. Times, Oct. 11, 1985, at A1, col. 6. At the time, the *Achille Lauro* was in the territorial waters of Egypt. Smith, *The Voyage of the Achille Lauro*, TIME, Oct. 21, 1985, 30; Tagliabue, *Ship Carrying 400 is Seized; Hijackers Demand Release of 50 Palestinians in Israel*, N.Y. Times, Oct. 8, 1985, at A1, col. 6. The hijackers threatened to blow up the boat unless Israel agreed to release several Palestinians who were imprisoned in Israel. *Id.* On October 9, when it appeared that Israel would not negotiate, Egypt allowed the Palestine Liberation Organization to remove the hijackers from the ship. *Id.*; Gwertzman, *State Department Angry at Speedy Accord With Gunmen*, N.Y. Times, Oct. 10, 1985, at A1, col. 3. On October 10, 1985 the Egyptian government allowed the hijackers to travel on an Egyptian commercial aircraft to Tunisia. Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Divert It To NATO Base In Italy; Gunmen Face Trial In Slaying of Hostage*, N.Y. Times, Oct. 11, 1985, at A1, col. 6.

craft carrying the *Achille Lauro* hijackers to land in Italy.⁷⁸ Asserting jurisdiction on the basis of the passive personality principle, the United States requested that Italy extradite the offenders to the United States to stand trial for the murder of the U.S. national.⁷⁹ Although Italy refused to extradite the hijackers,⁸⁰ the U.S. actions illustrate U.S. recognition of the passive personality principle.⁸¹

Two recent U.S. statutes similarly evidence the U.S. acceptance of the passive personality principle.⁸² The first statute, the Hostage Taking Act of 1984 (the "Hostage Taking Act"),⁸³ which was used in *Yunis*,⁸⁴ grants jurisdiction over hostage takings committed by individuals outside the United States when the victims are U.S. nationals.⁸⁵ The second statute, the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (the "Antiterrorism Act"),⁸⁶ involves the assertion of passive personality jurisdiction over violent crimes that are committed abroad by foreigners that injure U.S. nationals.⁸⁷

78. Gwertzman, *U.S. Intercepts Jet Carrying Hijackers; Fighters Divert It To NATO Base In Italy; Gunmen Face Trial In Slaying of Hostage*, N.Y. Times, Oct. 11, 1985, at A1, col. 6.

79. *Id.*; see Briefing by National Security Advisor Robert McFarlane on the Apprehension of the *Achille Lauro* Hijackers, Oct. 11, 1985, 24 I.L.M. 1516, 1517 (1985).

80. *The U.S.-Italian Quarrel*, N.Y. Times, Oct. 18, 1985, at A8, col. 5.

81. *United States v. Yunis*, 681 F. Supp. 896, 900-03 (D.D.C. 1988) (discussing U.S. assertion of passive personality jurisdiction in *Achille Lauro* affair), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989); McGinley, *supra* note 12, at 710-13 (discussing U.S. acceptance of passive personality jurisdiction in *Achille Lauro* affair).

Since the *Achille Lauro* affair, the International Maritime Organization has adopted a Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *done* Mar. 10, 1988, 27 I.L.M. 672. The Convention allows jurisdiction over unlawful acts at sea based on the floating territory, territoriality, nationality, protective, and passive personality theories. *Id.* at 675-76. The Convention also allows jurisdiction when the offender is a stateless person with residence in the prosecuting state. *Id.*

82. See 18 U.S.C. §§ 1203, 2331 (1988).

83. 18 U.S.C. § 1203 (1988).

84. See *United States v. Yunis*, 681 F. Supp. 896, 904-05 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989).

85. 18 U.S.C. § 1203(b)(1)(A) (1988). The Hostage Taking Act makes it a crime punishable in the United States to take hostages outside the United States when "the person seized or detained is a national of the United States." *Id.*

86. 18 U.S.C. § 2331 (1988).

87. *Id.* The Antiterrorism Act provides that "[w]hoever kills a national of the United States, while such national is outside the United States, shall [be fined or imprisoned by U.S. courts under U.S. law]." *Id.*

One commentator has suggested that this statute is not meant to adopt the passive personality principle but only the protective principle. See Blakesley, *supra* note

The debate concerning the validity of the passive personality principle has waxed and waned.⁸⁸ Even though the Harvard Research Project rejected the principle in 1935, at that time it was considered valid under international law because enough countries had accepted it.⁸⁹ Since the Harvard Research Project, other countries have codified the principle,⁹⁰ including France and the United States, two countries that had initially opposed the principle.⁹¹

II. METHODS OF APPLYING THE PASSIVE PERSONALITY PRINCIPLE

There is no uniformity as to the methods of applying the

11, at 942. However, an analysis of the wording of the statute, its legislative history, and the requirements of the protective principle show that this position is untenable. See 18 U.S.C. § 2331 (1988); H.R. CONF. REP. NO. 783, 99th Cong., 2d Sess. 1, 87, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 1926, 1960; *supra* note 44 (discussing protective principle). The statute requires only that a crime injure a U.S. national. 18 U.S.C. § 2331 (1988). The protective principle, however, requires the infringement of a security interest of the country seeking to assert jurisdiction. *Harvard Research Project*, *supra* note 4, at 543. The protection of nationals abroad does not rise to the level of a security interest under international law. See *United States v. Yunis*, 681 F. Supp. 896, 903 n.14 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989). Also, in the legislative history of the Antiterrorism Act, Congress stated that "[t]he elements are (1) the murder (2) of a U.S. national (3) outside the territorial jurisdiction of the United States." H.R. CONF. REP. NO. 783, *supra*, at 87. These are the requirements of the passive personality principle, not the protective principle. See *Harvard Research Project*, *supra* note 4, at 445; *supra* notes 8-11, 44 and accompanying text (discussing passive personality principle and protective principle).

88. See RESTATEMENT (THIRD), *supra* note 7, § 402 comment g. Comment g states that "[t]he principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials." *Id.*

89. See Berge, *supra* note 35, at 381-82. Berge states that "[w]hen such a respectable number of nations make claims of varying degrees of extravagance, it is difficult to say that [it] is settled [that the passive personality principle is invalid under international law]." *Id.* (discussing rejection of principle by *Lotus* dissenters a decade prior to *Harvard Research Project*); see *supra* note 47 and accompanying text (listing countries that *Harvard Research Project* described as utilizing passive personality principle in 1935).

90. See C. PR. PEN. art. 689, ¶ 1 (Daloz 1987-88) (Fra.); Penal Law Amendment (Offenses Committed Abroad) (Amendment No. 4) Law 5732, 26 LAWS OF THE STATE OF ISRAEL (official translation prepared at the Ministry of Justice, 1971-72); 18 U.S.C. §§ 1203, 2331 (1988).

91. See *supra* notes 60-87 and accompanying text (discussing French and U.S. acceptance of passive personality principle).

passive personality principle.⁹² Countries that have codified the passive personality principle utilize one or more of seven possible methods in its application.⁹³ First, the principle can be applied broadly to cover all crimes.⁹⁴ Second, the principle is used in cases involving specifically enumerated crimes.⁹⁵ A third method employed exercises passive personality jurisdiction over crimes with a certain minimum degree of punishment.⁹⁶ Fourth, some countries provide that the principle is to be used only when the executive consents to its assertion.⁹⁷ A

92. See ZHONGHUA RENMIN GONGHEGUO XINGFA art. 6 (1990) (China) (applying principle only to crimes with a punishment of at least three years of imprisonment); STRAFFELOVEN [STRFL] § 8(1)(III) (1926, as amended 1988-1989) (Den.) (applying principle when acts require penalty more severe than simple detention); RIKOSLAKI [RL] ch. 1, § 3 (1889, as amended 1989) (Fin.) (using principle when act is also a crime where committed); C. PR. PEN. art. 689, ¶ 1 (Dalloz 1987-88) (Fra.) (using principle over all crimes by foreigners abroad that injure French nationals); POINKOS NOMOS arts. 7, 9 (1990) (Greece) (using principle when act is a felony or misdemeanor); C.P. art. 7 (1930, with amendments as of 1987) (Italy) (using degree of punishment as a restriction on use of principle); STRAFFELOVEN [STRFL] § 13 (1902, as amended 1961) (Nor.) (requiring executive approval to use principle); BROTTSBALK [BRB] ch. 2 (1989) (Swed.) (applying principle when offender is found in the territory); 18 U.S.C. §§ 1203, 2331 (1988) (applying principle to enumerated crimes).

93. See ZHONGHUA RENMIN GONGHEGUO XINGFA art. 6 (1990) (China) (applying principle only to crimes with a punishment of at least three years of imprisonment); STRFL § 8(1)(III) (1926, as amended 1988-89) (Den.) (applying principle when acts require penalty more severe than simple detention); RL ch. 1, § 3 (1889, as amended 1989) (Fin.) (using principle when act is also a crime where committed); C. PR. PEN. art. 689, ¶ 1 (Dalloz 1987-88) (Fra.) (using principle over all crimes by foreigners abroad that injure French nationals); POINKOS NOMOS arts. 7, 9 (1990) (Greece) (using principle when act is a felony or misdemeanor); C.P. art. 7 (1930, with amendments as of 1987) (Italy) (using degree of punishment as a restriction on use of principle); STRFL § 13 (1902, as amended 1961) (Nor.) (requiring executive approval to use principle); BRB ch. 2 (1989) (Swed.) (applying principle when offender is found in the territory); 18 U.S.C. §§ 1203, 2331 (1988) (applying principle to enumerated crimes).

Italy and the United States are two countries that use a combination of these methods. See C.P. art. 10 (1930, as amended 1987) (Italy) (limiting passive personality principle to specific crimes with specific degrees of punishment); 18 U.S.C. §§ 1203, 2331(e) (1988) (limiting passive personality principle to specific crimes and requiring certification by the Department of Justice in some cases).

94. See C. PR. PEN. art. 689, ¶ 1 (Dalloz 1987-88) (Fra.); *supra* note 60 (providing text of French provision); *infra* notes 101-07 and accompanying text (discussing broad application of passive personality principle).

95. See 18 U.S.C. §§ 1203, 2331 (1988). For a discussion of the application of the principle to enumerated crimes, see *supra* notes 83-87.

96. See ZHONGHUA RENMIN GONGHEGUO XINGFA art. 6 (1990) (China); STRFL § 8(1)(III) (1926, as amended 1988-89) (Den.); C.P. art. 10 (1930, as amended 1987) (Italy).

97. See RL ch. 1, § 6 (1889, as amended 1989) (Fin.); C.P. art. 10 (1930, as

fifth method of codifying the principle allows its use only when the accused is found in the territory of the country seeking to exercise jurisdiction.⁹⁸ Sixth, some countries assert passive personality jurisdiction when the country with territoriality jurisdiction does not prosecute.⁹⁹ Finally, the principle can be used when the act is also a crime in the country where it occurred.¹⁰⁰

The broad method is the least utilized application of the principle.¹⁰¹ The French legislature used this method when it amended the French Penal Code in 1975 to include passive personality jurisdiction.¹⁰² The French statute provides that the perpetrator of any crime against a French national abroad may be prosecuted under French law.¹⁰³ The French law provides jurisdiction to the broadest extent possible under the passive personality principle.¹⁰⁴ Some courts have criticized such an assertion of passive personality jurisdiction because it subjects a person to the criminal laws of a country when that person would have no such expectation.¹⁰⁵ Furthermore, such a broad assertion of passive personality jurisdiction would require an individual to be familiar with the criminal codes of many foreign countries.¹⁰⁶ This would especially be true in "international" cities such as New York, Los Angeles, London, Paris, and Tokyo, where people encounter numerous foreigners on a daily basis.¹⁰⁷

amended 1987) (Italy); STRFL § 13 (1902, as amended 1961) (Nor.); BRB ch. 2, § 5 (1989); Beckett, *supra* note 10, at 48.

98. See C.P. art. 10 (1930, as amended 1987) (Italy); STRFL § 12(4)(b) (1902, as amended 1961) (Nor.); Beckett, *supra* note 10, at 48.

99. See KOREAN CRIMINAL CODE art. 6 (1983) (Kor.).

100. See RL ch. 1, § 3 (1889, as amended 1989) (Fin.); POINKOS NOMOS art. 7(1) (1990) (Greece); STRFL § 13 (1902, as amended 1961) (Nor.); BRB ch. 2, § 2 (1989) (Swed.); STRAFGESETZBUCH [StGB] § 7(1) (1871, as amended 1986) (W. Ger.).

101. See *Harvard Research Project*, *supra* note 4, at 579; see also H.R. CONF. REP. No. 783, *supra* note 87, at 87.

102. C. PR. PEN. art. 689, ¶ 1 (Dalloz 1987-88) (Fra.). For the text of the statute see *supra* note 60.

103. C. PR. PEN. art. 689, ¶ 1 (Dalloz 1987-88) (Fra.).

104. See *id.*; Blakesley, *supra* note 11, at 938-39 (French law uses passive personality principle to "its fullest measure."); *Harvard Research Project*, *supra* note 4, at 578-79; see also H.R. CONF. REP. No. 783, *supra* note 87, at 87.

105. See *United States v. Yunis*, 681 F. Supp. 896, 902 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989).

106. See *Yunis*, 681 F. Supp. at 902 n.11.

107. See *The Lotus Case* (Fra. v. Turk.), P.C.I.J. (ser. A) No. 10, at 92 (1923), 2

The second method applies the passive personality principle to specifically enumerated crimes.¹⁰⁸ This method of using the passive personality principle can be found in two U.S. criminal laws—the Hostage Taking Act¹⁰⁹ and the Antiterrorism Act.¹¹⁰ Under the authority provided by these statutes, the United States can apply passive personality jurisdiction in cases involving hostage taking,¹¹¹ homicide, attempted homicide, and physical violence with intent to cause serious bodily injury to a U.S. national.¹¹² This method is also codified to apply the passive personality principle to only certain classes of crimes.¹¹³ The Greek penal code utilizes this method by limiting passive personality jurisdiction to felonies and misdemeanors.¹¹⁴

Another method applies the passive personality principle to crimes with a minimum degree of punishment.¹¹⁵ The Italian penal code employs this method,¹¹⁶ by applying passive personality jurisdiction to offenses for which the minimum penalty is one year of incarceration.¹¹⁷ This method excludes petty crimes for which only minor punishment is provided.¹¹⁸

Some countries have codified the passive personality principle but require executive consent in each case that relies on the principle for jurisdiction.¹¹⁹ This method enables a gov-

HUDSON, WORLD COURT REPORTS 20, 82 (1929) (Moore, J. dissenting) ("In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes.").

108. See 18 U.S.C. § 1203 (1988); 18 U.S.C. § 2331 (1988). See *supra* notes 83-87 and accompanying text for a discussion of the Hostage Taking Act and the Antiterrorism Act.

109. 18 U.S.C. § 1203 (1988). See *supra* notes 83-85 and accompanying text for a discussion of this statute.

110. 18 U.S.C. § 2331 (1988). See *supra* notes 86-87 and accompanying text for a discussion of this statute.

111. 18 U.S.C. § 1203 (1988).

112. 18 U.S.C. § 2331 (1988).

113. See, e.g., POINKOS NOMOS art. 7 (1990) (Greece).

114. *Id.*

115. See, e.g., C.P. art. 10 (1930, as amended 1987) (Italy) (applying passive personality principle to crimes where punishment is at least one year of incarceration).

116. See *id.*

117. *Id.* "Italian law prescribes [the punishment of death or] life imprisonment, or imprisonment for a minimum of not less than one year . . ." ITALIAN PENAL CODE (E. Wise trans. 1978) (American Series of Foreign Penal Codes, No. 23).

118. See C.P. art. 10 (1930, as amended 1987) (Italy).

119. See RL ch. 1, § 6 (1889, as amended 1989) (Fin.); C.P. art. 10 (1930, as

ernment to avoid conflicts with other states over the assertion of passive personality jurisdiction.¹²⁰ For example, the Norwegian Penal Code provides that the king must commence all legal proceedings based on passive personality jurisdiction.¹²¹ Finland, Italy, and Sweden also require executive consent for the application of the principle.¹²²

The Antiterrorism Act of the United States includes a provision that is analogous to the executive consent requirement in the Norwegian code.¹²³ This provision requires an officer in the U.S. Attorney General's office, an administrative office of the executive branch, to certify that the prosecution involves a certain type of crime.¹²⁴ Without the certification, a U.S. court cannot exercise passive personality jurisdiction over a crime prosecuted under this statute.¹²⁵

Some countries assert passive personality jurisdiction only when the alleged criminal is found in the territory of the country intending to prosecute.¹²⁶ The Italian penal code contains this method of using passive personality jurisdiction.¹²⁷ This method can be used in two ways. First, it can be applied to cases where the alleged offender voluntarily enters the country.¹²⁸ Second, it can be applied in cases of extradition, kid-

amended 1987) (Italy); STRFL § 13 (1902, as amended 1961) (Nor.); BrB ch. 2, § 5 (1989) (Swed.).

120. See Beckett, *supra* note 10, at 48 (noting that this method allows a government to avoid conflicts with countries not using the principle).

121. STRFL § 13 (1902, as amended 1961) (Nor.). Under Norwegian law, "legal proceedings [relying on the passive personality principle] can be initiated only by the decision of the King." THE NORWEGIAN PENAL CODE (H. Schjoldager trans. 1961) (American Series of Foreign Penal Codes, No. 3).

122. RL ch. 1, § 6 (1889, as amended 1989) (Fin.); C.P. art. 10 (1930, as amended 1987) (Italy); BrB ch. 2, § 5 (1989) (Swed.).

123. 18 U.S.C. § 2331(e) (1988).

124. *Id.* The attorney general, or the highest ranking subordinate of the attorney general, must certify that the defendant's act was intended to coerce a government or civilian population. *Id.* The certification is not subject to judicial review. H.R. CONF. REP., *supra* note 87, at 87-88.

125. 18 U.S.C. § 2331(e) (1988); H.R. CONF. REP., *supra* note 87, at 87-88.

126. See, e.g., C.P. art. 10 (1930, as amended 1987) (Italy); STRFL § 12 (1902, as amended 1961) (Nor.).

127. See C.P. art. 10 (1930, as amended 1987) (Italy).

128. See, e.g., C.P.D.F. art. 186 (1886) (Mex.). The Mexican statute at issue in *Cutting's Case*, required that "the accused be in [Mexico], whether . . . voluntarily or . . . brought [in] by extradition." *Cutting's Case*, U.S. DEP'T OF STATE, 1887 FOREIGN RELATIONS 751, 760 (1888), 2 MOORE, INTERNATIONAL LAW DIGEST 228, 230-31 (1906) (translating art. 186 of Mexican Penal Code); see STRFL § 12 (1902, as

napping, or arrest in international waters where the offender is brought into the territory of the prosecuting country.¹²⁹ In the second case, the "found-in-the-territory" limitation stems from the principle in international law that a person cannot be tried for a crime unless they are present at the trial.¹³⁰

Another method of using passive personality jurisdiction is to employ it when the state with territoriality jurisdiction does not try the crime.¹³¹ The Korean Criminal Code utilizes this method;¹³² it protects the offender from "double jeopardy."¹³³ This method also guards against diplomatic tension caused by two countries disputing who has jurisdiction over the criminal act.¹³⁴

There is also a requirement in some countries' statutes that the act be a crime in the country in which it occurred.¹³⁵ The Finnish penal code includes this requirement for the assertion of passive personality jurisdiction.¹³⁶ This method re-

amended 1961) (Nor.) (applying passive personality principle when foreigner is domiciled or staying in Norway).

129. See *United States v. Yunis*, 681 F. Supp. 909, 915 (D.D.C.) (holding that trial court was not required to divest itself of personal jurisdiction despite unusual method of arrest), *rev'd in part* 859 F.2d 953 (D.C. Cir. 1988); M. Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25 (1973) (discussing various means of getting offender into the territory); Lewis, *Scholars Say Arrest of Noriega Has Little Justification in Law*, N.Y. Times, Jan. 10, 1990, at A12, col. 1. This article noted that U.S. courts have not dismissed any case when the method of bringing the suspect before the court has been questionable, such as abduction or kidnapping. *Id.*; see *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975). In *Toscanino*, the Second Circuit held that "due process [requires] a court to divest itself of jurisdiction over the person of the defendant where it has been acquired as a result of the government's deliberate, unnecessary and unreasonable invasion of the accused constitutional rights." *Toscanino*, 500 F.2d at 275. On remand, however, the district court held that due process did not require it to divest itself of personal jurisdiction over the defendant because of the unusual method of apprehension. *Toscanino*, 398 F. Supp. at 917.

130. Sarkar, *supra* note 10, at 66; *Harvard Research Project*, *supra* note 4, at 616.

131. See, e.g., KOREAN CRIMINAL CODE art. 6 (1983) (Kor.); see Blakesley, *supra* note 11, at 909-10.

132. See KOREAN CRIMINAL CODE art. 6 (1983) (Kor.).

133. Sarkar, *supra* note 10, at 66; see *Harvard Research Project*, *supra* note 4, at 616.

134. See *Harvard Research Project*, *supra* note 4, at 443.

135. See, e.g., RL ch. 1, § 3 (1889, as amended 1989) (Fin.); POINKOS NOMOS art. 7(1) (1990) (Greece); STRFL § 13 (1902, as amended 1961) (Nor.); BRB ch. 2, § 2 (1989) (Swed.).

136. See RL ch. 1, § 3 (1889, as amended 1989) (Fin.). Finnish law applies the passive personality principle to a "criminal act perpetrated outside of Finland, if it is

lieves an individual of the burden of having to know the laws of foreign countries.¹³⁷ Greece, Norway, and Sweden also utilize this method.¹³⁸

Although the validity of the passive personality principle is no longer in question, the principle is still a matter of controversy because no agreement has been reached regarding its scope.¹³⁹ When the international community reaches an agreement on the scope of the principle, it will become an even more effective basis of jurisdiction.

III. APPLICATION OF THE PASSIVE PERSONALITY PRINCIPLE TO COMBAT INTERNATIONAL TERRORISM

A. *The Need for Uniformity*

The last two decades have witnessed a dramatic increase in the number of occurrences of international terrorism each year,¹⁴⁰ and increasingly, terrorist acts are committed on the basis of the victim's nationality.¹⁴¹ During the last few decades

also punishable according to the law of the place of the act." THE FINNISH PENAL CODE (American Series of Foreign Penal Codes, No. 27) (M. Joutsen trans. 1987).

137. See *United States v. Yunis*, 681 F. Supp. 896, 902 n.11 (D.D.C. 1988) (noting that it might be too much to expect individuals to know laws of every country), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989).

138. See POINKOS NOMOS art. 7(1) (1990) (Greece); STRFL § 13 (1902, as amended 1961) (Nor.); BRB ch. 2, § 2 (1989) (Swed.).

139. See *supra* notes 92-139 and accompanying text (discussing current methods of using passive personality principle).

140. N. LIVINGSTONE & T. ARNOLD, *supra* note 1, at 12; U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1988, at 1 (1989) (reporting 856 incidents of terrorism in 1988, up from 832 in 1987); U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1986, at 1 (1988) (reporting 744 incidents of terrorism in 1986, halting upward trend); Kane, *supra* note 1, at 295 (Department of State reported 782 incidents of terrorism in 1985); Mastrangelo, *supra* note 1, at 7.

141. Bell, *supra* note 2, at 307-09.

There are several examples of acts of terrorism directed at particular individuals because of their nationality. On September 5, 1972, nine members of the Israeli Olympic team were murdered while attending the Munich Olympics. Binder, *9 Israelis On Olympic Team Killed With 4 Arab Captors As Police Fight Band That Disrupted Munich Games*, N.Y. Times, Sep. 6, 1972, at A1, col. 6. On November 4, 1979, 60 U.S. nationals were taken hostage in the U.S. Embassy in Tehran, Iran. Gwertzman, *U.S. Rejects Demand of Students in Iran to Send Shah Back*, N.Y. Times, Nov. 6, 1979, at A1, col. 6; Reuters, *Teheran Students Seize U.S. Embassy and Hold Hostages*, N.Y. Times, Nov. 5, 1979, at A1, col. 6. On December 21, 1988, a Pan American World Airways flight carrying primarily U.S. nationals, was destroyed over Scotland by a bomb that had been placed on the plane by a terrorist group. Whitney, *Jetliner Carrying 258 to U.S.*

the international community has increasingly accepted the passive personality principle as applied to terrorism but not as applied to ordinary torts and crimes.¹⁴² The international scope of terrorist acts is one reason for the principle's acceptance.¹⁴³ Asserting passive personality jurisdiction over acts of terrorism does not infringe on the sovereignty interest of the state with territoriality jurisdiction as in cases of ordinary torts and crimes.¹⁴⁴ In order to bring more effectively those responsible for such acts to justice the international community should adopt a uniform approach to the use of the passive personality principle.

The passive personality principle would be most effective if applied on a uniform basis by all states. Uniform application of the principle serves three national goals. First, it would ensure extradition in cases properly relying on the principle.¹⁴⁵ Second, uniformity would ensure fairness in the use of the principle.¹⁴⁶ Third, uniform application would allow a state to provide better protection for its nationals abroad.¹⁴⁷

Uniform application of the principle would ensure extradition so that the interested country could prosecute the offender. When deciding whether to extradite an alleged offender, one of the main considerations is jurisdiction.¹⁴⁸ If the laws of the country that has possession of the offender do not provide for, or conflict with, the type of jurisdiction asserted by the country requesting extradition, extradition may be refused.¹⁴⁹ By adopting a uniform application of the passive per-

Crashes in Scottish Town, N.Y. Times, Dec. 22, 1988, at A1, col. 6. See generally U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 1988, at 8-44 (1989) (discussing incidents of terrorism directed at nationals of various countries).

142. RESTATEMENT (THIRD), *supra* note 7, § 402 comment g.

143. See *id.*

144. See *The Lotus Case* (Fra. v. Turk.), P.C.I.J. (ser. A.) No. 10, at 35, 44-45, 101-02 (1923), 2 HUDSON, WORLD COURT REPORTS 20, 47, 53-54, 88 (1929); *infra* note 165 (discussing how use of passive personality principle can infringe on sovereign interest of state with territoriality jurisdiction).

145. See *infra* notes 148-50 and accompanying text (discussing need for uniformity to ensure extradition).

146. See *infra* notes 151-54 and accompanying text (discussing need for uniformity to ensure fairness).

147. See *infra* notes 155-58 and accompanying text (discussing need for uniformity to provide better protection for nationals abroad).

148. M. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 12, at 270.

149. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 744. Examples of this can be found in the his-

sonality principle, countries should be willing to extradite offenders to states asserting such jurisdiction.¹⁵⁰

Second, a uniform application of the passive personality principle is necessary to provide fairness in its use.¹⁵¹ One of the arguments against the passive personality principle is that it subjects an individual to the laws of foreign countries to which that individual would not expect to be subject.¹⁵² Were the passive personality principle applied on a uniform basis, an individual can expect to be subject to certain foreign laws.¹⁵³ Thus, countries can use the passive personality principle with little opposition from other states in the international community.¹⁵⁴

Finally, the uniform application of the passive personality principle will allow states to provide better protection for their nationals abroad.¹⁵⁵ The uniform application will put individuals on notice that if they commit a crime against nationals of another country, that country may punish them regardless of where the act occurs.¹⁵⁶ This application should deter criminal acts because individuals may no longer expect to be free from prosecution where the country in which the act occurs is unlikely to prosecute.¹⁵⁷ In addition, because extradition will be

tory of the passive personality principle. In 1975, prior to U.S. acceptance of the principle, the United States refused to extradite certain prisoners to the Federal Republic of Germany when passive personality jurisdiction was asserted. U.S. DEP'T OF STATE, *DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW* 177 (1975).

Following the forced landing of the *Achille Lauro* hijackers in Italy, the United States requested extradition from Italy relying on the passive personality principle. *The U.S.-Italian Quarrel*, N.Y. Times, Oct. 18, 1985, at A8, col. 5. Although Italy refused to extradite the hijackers, it did prosecute them. See *id.*

150. See Blakesley, *supra* note 149, at 744 (noting that basis of jurisdiction is of concern in extradition requests).

151. See *The Lotus Case* (Fra. v. Turk.), P.C.I.J. (ser. A) No. 10, at 92 (1923), 2 HUDSON, *WORLD COURT REPORTS* 20, 82 (1929) (Moore, J. dissenting) (discussing unfairness of unsuspecting individual being subject to foreign laws under passive personality principle).

152. *Id.* For a discussion of this argument, see *supra* note 37.

153. See *United States v. Yunis*, 681 F. Supp. 896, 902 (D.D.C. 1988) (noting that in some cases offenders should expect to be prosecuted by other countries), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989).

154. See Beckett, *supra* note 10, at 48 (discussing how countries seek to avoid conflict in cases using passive personality jurisdiction).

155. Sarkar, *supra* note 10, at 66.

156. See *Yunis*, 681 F. Supp. at 902 & n.11 (noting that offenders should expect to be prosecuted by other countries when they injure their nationals).

157. See N. LIVINGSTONE & T. ARNOLD, *supra* note 1, at 14; Rosenthal, *On My*

easier for the country seeking custody, thereby increasing the likelihood of prosecution, individuals will be further deterred from targeting nationals of countries that use the passive personality principle.¹⁵⁸

B. *A Proposed Application of the Principle*

1. Terms of the Proposal

The purpose of the passive personality principle is to allow a country to protect its nationals when they are outside its territorial limits.¹⁵⁹ Such protection is likely to be most effective if the principle is used or accepted by the entire community of nations. Acceptance, however, is most likely only if the principle is enacted with certain limitations.¹⁶⁰ One such limitation would be to apply the principle to instances involving acts of international terrorism that are directed at individuals due to their nationality.¹⁶¹ International terrorism should be defined for purposes of the passive personality principle as acts of planned violence outside the context of war that are directed against individuals or property and that are designed to achieve results by creating fear, or that are committed to achieve violent results as ends in themselves.¹⁶² By defining

Mind, The Mad Circle, N.Y. Times, Sep. 22, 1989, at A35, col. 5. For example, in the *Achille Lauro* affair, Italy released two of the accomplices to the hijacking. Weinraub, *Italy Said to Free 2 P.L.O. Aides; U.S. Issues a Warrant for One; Hostages Tell of a "Death List"*, N.Y. Times Oct. 13, 1985, at A1, col. 6; see *The U.S.-Italian Quarrel*, N.Y. Times, Oct. 18, 1985, at A8, col. 5.

158. See *supra* notes 148-50 and accompanying text for a discussion of the need for uniformity to ensure extradition.

159. See *supra* note 10 and accompanying text (discussing purpose of passive personality principle).

160. *Harvard Research Project*, *supra* note 4, at 579; see *supra* notes 49-50 and accompanying text (discussing need for limits on passive personality principle).

161. See McGinley, *supra* note 12, at 712-13 (noting that passive personality principle not illogical when victim singled out because of nationality).

162. Defining terrorism in this manner may further two goals: first, it may encourage uniform acceptance of the definition, second, it may lead to acceptance of the application of the passive personality principle to international terrorism directed at the victim because of nationality. Defining terrorism in this way allows more flexibility in determining if an act is in fact terrorism. Moreover, it only applies the passive personality principle to acts of terrorism that the perpetrator knows are wrong. See *United States v. Yunis*, 681 F. Supp. 896, 902 n.11 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989).

It should be noted, however, that the international community has been unable to agree on a uniform definition of international terrorism. J. MURPHY, *STATE SUPPORT OF INTERNATIONAL TERRORISM* 3 (1989); Blakesley, *supra* note 11, at 901-03;

international terrorism in this manner, passive personality jurisdiction is limited to crimes that the offender knows are illegal.¹⁶³

The most important limitation in this proposal is that the act be directed at individuals because of their nationality. With this qualification, the interests of both the country with territoriality jurisdiction and the country with passive personality jurisdiction may be reconciled.¹⁶⁴ This limitation would allow the country with passive personality jurisdiction to assert it in cases where its interest outweighs that of the country with territoriality jurisdiction, thereby preserving the sovereignty of the country with territoriality jurisdiction to the greatest extent.¹⁶⁵

Hannay, *supra* note 1, at 268 n.1 (noting that precise meaning of terrorism in debate); Lodge, *Introduction- Terrorism and Europe: Some General Considerations*, in *THE THREAT OF TERRORISM* 1 (J. Lodge ed. 1988); U.S. DEP'T OF STATE, *PATTERNS OF GLOBAL TERRORISM*: 1988, at iv (1989); *see* European Convention on the Suppression of Terrorism, *reprinted* in 15 I.L.M. 1272 (1976); Report of the Ad Hoc Committee on International Terrorism, 28 U.N. GAOR Supp. (No. 28) 1, U.N. Doc. A/9028 (1973); Organization of American States Convention on Terrorism, Feb. 2, 1971, T.I.A.S. 8413.

Even in the United States there is disagreement on the definition of international terrorism. U.S. law states that an

"act of terrorism" means an activity that . . . involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State; and . . . appears to be intended . . . to intimidate or coerce a civilian population . . . to influence the policy of a government by intimidation or coercion . . . or to affect the conduct of a government by assassination or kidnapping.

18 U.S.C. § 3077 (1988).

One author defines terrorism as "the intentional or extremely reckless application of violence against innocent individuals or property for the purpose of obtaining a military, political or religious end." Blakesley, *supra* note 11, at 902-03 (emphasis omitted). Another author states that

[t]errorism itself can be defined as a process that involves the intentional use of violence, or threat of violence, against an instrumental target in order to communicate to a primary target a threat of future violence so as both to coerce the primary target into behavior or attitudes through intense fear or anxiety and to serve a particular political end.

Paust, *supra* note 43, at 192-93.

163. *See Yunis*, 681 F. Supp. at 902 n.11. In *Yunis* the court noted that under the passive personality principle, people could be subject to foreign laws for acts that they did not know were illegal. *Id.*

164. Blakesley, *supra* note 11, at 909.

165. *Id.* A primary objection to the passive personality principle, as well as to other types of extraterritorial jurisdiction, is that it infringes upon the sovereignty of the country with territoriality jurisdiction. *See The Lotus Case (Fra. v. Turk.)*, P.C.I.J.

2. The Proposal and the Goals of Uniformity

This proposal for the application of the passive personality principle to terrorist acts would achieve the three goals of uniformity.¹⁶⁶ The proposal would ensure extradition in cases involving international terrorism directed at individuals because of their nationality, ensure fairness in the application of the passive personality principle, and would assist states in better protecting their nationals abroad.

By circumscribing the application of the passive personality principle, it is more likely that the proposal would lead to the uniform acceptance of the principle.¹⁶⁷ Uniform adoption of the proposal would ensure that extradition will occur when the passive personality principle is properly asserted.¹⁶⁸ In cases where the proposal applies, extradition would be easier because both countries would agree on the basis of jurisdiction as well as the instances to which it is applicable.

The two limitations of the proposed application of the passive personality principle would also ensure fairness in the use of the principle.¹⁶⁹ By applying the principle to cases of international terrorism, the proposal would apply only to cases where the offenders realize that their acts are illegal.¹⁷⁰ The second limitation, that the victims be targeted because of their nationality, provides for just application of the principle because the offender has reason to expect to be prosecuted by

(ser. A.) No. 10, at 35, 44-45, 101-02 (1923), 2 HUDSON, WORLD COURT REPORTS 20, 47, 53-54, 88 (1929).

Professor Blakesley asserts that there is a hierarchy of concurrent jurisdiction in international law regarding the five bases of criminal jurisdiction. Blakesley, *Jurisdiction*, *supra* note 11, at 909. In that hierarchy, the territoriality principle is the highest priority jurisdiction. *Id.* While the country with territoriality jurisdiction has a great interest in asserting jurisdiction in order to ensure peace in its territory, the state whose citizens are targeted as victims has a greater interest because more likely than not the perpetrators of the terrorist act are more concerned with the persons they target than where the act occurs. *Id.*

166. See *supra* notes 145-58 and accompanying text (discussing need for uniformity).

167. See *supra* note 160 and accompanying text (discussing need to limit passive personality principle to achieve uniform acceptance).

168. See *supra* notes 148-50 and accompanying text (discussing need for uniformity to ensure extradition).

169. See *supra* notes 151-54 and accompanying text (discussing how uniformity would ensure fairness in use of passive personality principle).

170. See *United States v. Yunis*, 681 F. Supp. 896, 902 n.11 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989).

the victim's country.¹⁷¹

Finally, the proposal would also satisfy the third goal of uniformity—the better protection of nationals abroad.¹⁷² By providing a more effective method of bringing international terrorists to justice, the proposal may act as a deterrent to terrorists.

This proposal for the uniform application of the passive personality principle should help bring terrorists to justice. While it does contain some features that are already employed in the criminal laws of various states,¹⁷³ it is a new approach that, if used on a uniform basis, should lead to the effective prosecution of terrorists.

C. The Ineffectiveness of Current Applications of the Passive Personality Principle in Combatting International Terrorism

This proposed use of the passive personality principle differs from the broad application of the passive personality principle in the French penal code.¹⁷⁴ The French penal code grants passive personality jurisdiction over all crimes committed by individuals against French nationals abroad.¹⁷⁵ Because most states, however, would be unwilling to adopt the broad approach of the French penal code, it would not be an effective method of combatting international terrorism.¹⁷⁶ In order for the passive personality principle to be effective in this regard, it must be adopted on a uniform basis.¹⁷⁷ Thus, the proposed approach will be more effective against terrorism than the French application.

Countries that apply the principle to prosecute certain

171. *See id.*

172. *See supra* notes 155-58 and accompanying text (discussing goal of better protecting nationals).

173. *See supra* notes 92-139 and accompanying text (discussing current methods of using passive personality principle).

174. C. PR. PEN. art. 689, ¶ 1 (Dalloz 1987-88) (Fra.). For a discussion of the French method, *see supra* notes 102-04 and accompanying text.

175. C. PR. PEN. art. 689, ¶ 1 (Dalloz 1987-88) (Fra.). *See supra* notes 102-04 and accompanying text for a discussion of the French statute.

176. *Harvard Research Project, supra* note 4, at 579; *see* H.R. CONF. REP. NO. 783, *supra* note 87, at 87.

177. *See supra* notes 145-58 and accompanying text for a discussion of the need for uniformity.

enumerated crimes offer another possible approach.¹⁷⁸ Without agreement as to the crimes enumerated,¹⁷⁹ however, this approach alone fails to apply most effectively the passive personality principle.¹⁸⁰

The method used by countries such as Italy and Turkey, which apply the passive personality principle to crimes with a certain minimum degree of punishment, would similarly be unworkable in establishing a uniform application of the principle.¹⁸¹ Applying the principle in this manner would again lead to inconsistencies because most countries impose different degrees of punishment for the same crimes.¹⁸² As a result, crimes to which the principle would apply in one country could be different from the crimes to which it would apply in another country. If, under the authority provided by the passive personality principle, a country was seeking extradition for a crime to which the country with custody of the offender concluded that the principle did not apply under its laws, the country with custody may refuse to extradite.¹⁸³ This result would again defeat the purpose of adopting a uniform approach to the passive personality principle.¹⁸⁴

Norway and Finland require executive consent in each

178. See *POINKOS NOMOS* art. 7, 8 (1990) (Greece); 18 U.S.C. § 1203 (1988); 18 U.S.C. § 2331 (1988); *supra* notes 95, 108-14 and accompanying text (discussing application of principle to enumerated crimes only).

179. See *supra* notes 145-58 and accompanying text (discussing the need for uniformity).

180. Compare 18 U.S.C. § 1203 (1988) and 18 U.S.C. § 2331 (1988) (allowing passive personality jurisdiction over hostage taking and certain violent acts) with *POINKOS NOMOS* arts. 7, 8 (Aug. 1990) (Greece) (allowing passive personality jurisdiction over felonies and misdemeanors).

181. See *POINKOS NOMOS* art. 7, 9 (1990) (Greece); C.P. art. 10 (1930, as amended 1987) (Italy); *CEZA HUKUKU* art. 6 (1926) (Turk.); *supra* notes 106, 115-18 and accompanying text (discussing approach requiring crime with minimum degree of punishment).

182. Compare *RL* ch. 37, § 1 (1989) (Fin.) (2-6 years of incarceration for counterfeiting) and C.P. art. 453 (1930, as amended 1987) (Italy) (3-12 years of jail and a fine for counterfeiting) with 18 U.S.C. § 471 (1988) (fine up to \$5,000 and/or imprisonment up to 15 years for counterfeiting).

183. Blakesley, *supra* note 149, at 744; see M. BASSIOUNI, *INTERNATIONAL EXTRADITION*, *supra* note 12, at 270 (noting that in extradition, basis of jurisdiction is a consideration).

184. See *supra* notes 145-58 and accompanying text (discussing need for uniformity).

case before the use of the passive personality principle.¹⁸⁵ This method serves to lessen diplomatic tensions caused by the use of passive personality jurisdiction.¹⁸⁶ The use of the principle could achieve the same result as the proposed method if every executive allowed the use of passive personality jurisdiction only when the act in question was committed because of the victim's nationality. This method, however, would not be as effective as the proposed approach because of political pressures often confronting an executive. Without any other check upon the principle, political pressure might compel the executive to allow or in some cases prevent the assertion of passive personality jurisdiction.¹⁸⁷ By adopting a uniform approach that precludes the influence of external pressures, the passive personality principle can be effectively applied.

Two other methods of applying the passive personality principle conform with other existing principles of international law. First, the found-in-the-territory method stems from the principle that a defendant must be present at the trial.¹⁸⁸ Second, the requirement that the country with territoriality jurisdiction not prosecute evolves from the theory of prevention of double jeopardy.¹⁸⁹ The rationale behind these methods exist independently from the passive personality principle in international law and, therefore, automatically act as limits on the proposed method of using passive personality jurisdiction.

The final method used by states to apply the principle is by limiting it to cases where the offense is also a crime in the country in which it occurred.¹⁹⁰ In this manner, the offender is apparently aware that the act is illegal and should expect to be subject to punishment.¹⁹¹ This approach is not an effective

185. See *supra* notes 97, 119-22 and accompanying text (discussing executive approval method).

186. See *supra* note 120 and accompanying text (discussing purpose of executive approval method).

187. See *supra* notes 119-23 and accompanying text (discussing executive consent requirement).

188. C.P. art. 10 (1930, as amended 1987) (Italy); see *supra* notes 98, 126-30 and accompanying text (discussing "found-in-the-territory" method).

189. See *supra* notes 92, 131-34 and accompanying text (discussing method requiring that country with territoriality jurisdiction not prosecute).

190. See *supra* notes 100, 135-38 and accompanying text (discussing method applying principle to cases where act is crime where committed).

191. See *United States v. Yunis*, 681 F. Supp. 896, 902 n.11 (D.D.C. 1988), *appeal docketed*, No. 89-3208 (D.C. Cir. Nov. 30, 1989). The court stated that "it is not un-

method of combatting terrorist acts because, if such an act were not illegal where it occurs, the principle could not be applied. This could allow countries that sponsor terrorist activities to defeat effectively such an application of the principle.

The passive personality principle in its present forms of codification provides limited effectiveness. The principle, however, could be more effectively used to combat terrorism if adopted by the international community on a uniform basis. The uniform acceptance of the principle would provide for easier extradition of terrorists, fairness in its use, and greater protection of nationals travelling or living abroad. The proposed application to acts of international terrorism that are directed at the victims due to nationality will give greater effect to the principle and provide for its just utilization.

CONCLUSION

The frequent occurrence of terrorist acts is an ever increasing problem facing the international community. The uniform adoption and application of the passive personality principle will allow nations to bring terrorists to justice for their crimes. By working together with this new weapon for combatting terrorism, the international community can strive toward the eventual eradication of terrorism.

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realistic to assume that [the average citizen] would realize that committing a terrorist act might subject him to foreign prosecution." *Id.* (citation omitted).

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